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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

BRITTANY SWEENEY, Appellant, v. GEORGE TSCHIPORIKOV, Respondent.	C082949 (Super. Ct. No. FL151053)

Mother Brittany Sweeney appeals from the trial court's entry of judgment awarding sole physical custody to father George Tschiporikov with reasonable visitation to mother. She contends the trial court erred by issuing final orders instead of temporary orders regarding her request to move away with the former couple's young child (minor). She further contends the trial court used the wrong standard when making its ruling on her move-away request and abused its discretion by failing to consider the continuity and stability of care mother provided. Father contends mother's claims are moot because she withdrew her move-away request before entry of judgment. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Mother and father are the unmarried parents of minor, who was 15 months old at the time of their separation in early October 2015. On October 13, 2015, mother filed a request for order regarding child custody, child support, visitation, attorney fees and costs, and "Move-away (relocation)." Mother sought joint legal custody of minor but sole physical custody with father having limited visitation. Mother alleged father was incapable of caring for minor because of his alcohol and substance abuse. Regarding her move, mother indicated she intended to move to Seattle, Washington, where her father lived, to obtain her bachelor's degree in nursing. She would first finish her general education requirements at a community college, which had already admitted her, and then transfer to Seattle University, which was "willing to offer" her conditional acceptance for the fall 2016 semester.

On October 16, 2015, father filed a request for order, in which he requested the court continue mother's request for order regarding her "move-away with the minor child and for support and attorneys fees" to December 2015 so the parties could conduct discovery. Father "request[ed] the Court grant interim visitation orders to remain in place until the custody and visitation issues are finally determined, including most importantly, [mother's] request to relocate with [minor] to Washington." Father generally denied the allegations in mother's declaration and requested both parties be ordered to abstain from alcohol while having custody of minor. Mediation was subsequently held and determined unsuccessful.

Father later filed his response to mother's request for order. He did not consent to mother's proposed custody arrangements but did consent to child support "[p]ending an evidentiary hearing and necessary discovery related to the parties' respective circumstances." Father "request[ed] that the court set this matter for an evidentiary hearing so that all of the requisite move-away factors can be brought before the Court. [He] further request[ed] that this matter be set out to allow both parties the opportunity to

conduct discovery on the move-away factors as well as financial components to adequately determine a guideline child support calculation."

On December 1, 2015, the parties filed a stipulation for nonprejudicial "modifiable Interim Orders only" at a hearing on the parties' requests for orders. Mother and father stipulated to joint legal custody with sole physical custody to mother. Father was entitled to visitation for one overnight and one afternoon visit a week. Father also agreed to take breathalyzer tests during visits to confirm his abstinence from alcohol. The minute order reflects the parties discussed discovery and scheduling for the hearing on mother's move-away request. The "hearing" was set for February 23 and 24, 2016, with a status conference scheduled for January 14, 2016.

On February 19, 2016, father filed his trial brief. Mother filed her "TRIAL BRIEF" on February 22, 2016. In it she acknowledged "[t]his matter is set for Trial February 23 and 24, 2016, on the issues of Mother's request to relocate, visitation, relocation, child support and attorney's fees." In her legal argument regarding her request to move away, mother acknowledged "that in an initial *permanent* custody order, including one involving a relocation request, the trial court has the 'widest discretion to choose a parenting plan that is in the best interests of the child.' " (Italics added.)

At trial, mother testified. Father also testified and called two witnesses on his behalf.[1] The testimony established that mother and father reunited in 2013 after an extended period of separation and mother moved into father's home in Mammoth Lakes. Minor was born in May 2014 in Mammoth Lakes and lived in father's house with both of her parents until early October when mother moved with minor to her mother's home in Bishop. "[Mother] testified that at the time of [minor's] birth she thought that going back to school for a nursing career would be a good idea. She did not testify that she informed

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[1] The trial was not reported. Instead, the parties filed a settled statement prepared by the trial judge.

[father] of this desire. [Father] testified that he first became aware of [mother's] desire to go to nursing school . . . after the party's separation in October of 2015.

"[Mother] testified that [father] has had an alcohol problem from the time they first met to the present. [Father] testified that he did not/does not have an alcohol problem. [Father] acknowledged that he drinks socially, as does [mother], but that he does not drink at all when [minor] is in his custody. He further testified that he does not drink to a point that he is not in control and has never done anything that could have in any way endangered the safety of [minor].

"[Mother] testified that there have been a number of incidents where [father's] actions, while intoxicated, endangered [minor]. While [mother] contended that [father] never got up at night to take care of [minor], she testified that on two (2) separate occasions [mother] had asked [father] to get up in the night to care for [minor]. The first time was when [minor] was an infant. [Minor] woke up during the night and apparently needed attention. [Mother] asked [father] to take care of [minor] and then went back to sleep. When she woke up later, and went down stairs, she testified that [father] was passed out on the floor with [minor] wedged between two (2) pillows. The second incident occurred similarly when [mother] asked [father] to care for [minor] in the night. [Mother] testified that this time, [father] was passed out on the couch with [minor] in her car seat in the kitchen. [Father] in his testimony denied that he passed out due to alcohol and never did anything that could endanger [minor]. He would sleep on the couch on occasion, but that was because of his snoring.

"[Mother] testified about a number of other times that [father] evidenced excessive alcohol intoxication. She testified that on the day of [minor's] birth [father] went skiing and came to the hospital drunk; that [father] on a 'light night' drinks at least six (6) beers and six (6) shots every day; and that after the party's separation in October 2015, when [father] came to one of his visitations with [minor] he reeked of alcohol. [Mother] testified that this occurred in her and her mother's presence.

"[Mother] testified that she did not tell anyone of these alcohol related incidents, nor did she ever call CPS or any other agency to complain about [father's] child endangerment or alcohol abuse. She also stated that there were no witnesses to any of these incidents, except the one where her mother was present. [Mother] testified that [father] was never violent." Father denied mother's allegations.

"[Mother] testified that [father] told her that during the time of their separation and in 2013, he attended an alcohol rehabilitation program. [Father] testified that he did not attend an alcohol rehabilitation program. He stated that at the beginning of 2013, after the termination of a relationship with someone other than [mother], he attended a program to deal with depression and anxiety. He stated that it had nothing to do with alcohol. He further denied having an alcohol problem."

Mother also testified that on August 27, 2015, "she was sick and throwing up and called [father] at work. She testified that he took her to the hospital E.R. and was 'awful' to her. She stated that he had been drinking. After dropping her off at the hospital she stated that [father] went back to work and then went to a friend's house for two (2) days. [Mother] then moved out of [father's] house. She moved back in approximately two (2) weeks later. The parties went to counseling from approximately September 20 through October 3, 2015. [Father] testified that he never drank at work and that he had not consumed alcohol as alleged by [mother].

"[Mother] testified that the reason she moved back in with [father] was that they had discussed a cohabitation agreement whereby [father] would pay [mother] $150,000.00 and [father] would go to alcohol rehabilitation. There was nothing put in writing. [Mother] stated that it was a 'vague agreement' that was to 'level the playing field'. [Father] denied that there was any cohabitation agreement or any discussion of rehab. He stated that [mother] had requested such an agreement during the first part of September 2015, telling that he should 'do right by me'. [Father] did testify that he paid

[mother] $24,000.00 for what he described 'to keep the peace'. The testimony showed that [mother] used $12,000.00 for clothes and $10,000.00 for attorney fees."

"[Mother] testified that the only reason that she and [minor] moved out was because of [father's] drinking, and that it was not related to money. [Father] testified that he did not have a drinking problem. He drank socially just as did [mother]. He also testified that [mother] never had discussions with [him] about his drinking until the present proceedings.

"Shortly after [mother] initiated these proceedings the parties entered into a temporary custody agreement to remain in effect until the trial of the issues. [Mother] testified that although [father] felt that it was demeaning, in order to facilitate an agreement, he agreed to take a breathalyzer test at the start of each visitation. The evidence submitted showed that he tested negative at each testing."

Around October 2015, mother "decided to move to Washington State to further her desire to obtain a nursing degree(s). [Mother] has family including her father, his wife, her brother, an aunt, uncle and cousins [who] live in the Seattle area.

"[Mother] testified that although she was only a few units short of her undergraduate degree from California State University, Monterey Bay, because her prior college attendance was over (10) years ago, she will need to retake/complete 24 units (8 classes) of undergraduate classes. This would be a prerequisite to qualify for nursing school. [Mother] plans to take the 24 units at Seattle Central Community College, and then attend a nursing program at Seattle University. [Mother] would attend school full time. She anticipates that her monthly expenses would include approximately $2,000.00 for day care, and $2,500.00 for housing rental plus living expenses. She estimated a nursing program would cost from $40,000.00 to $50,000.00 per year. She testified that she thought that she could obtain a tuition waiver because her father was a veteran. She has not verified this opinion. Further, she would manage her finances and expect to

receive help from her father, subsidies, student loans, child support and, if necessary, work part-time as a waitress.

"[Mother] has never lived in Seattle. [Mother] has not personally visited any college or nursing school(s) in Seattle. She also has not looked for any residential housing in person. Her research has been limited to the internet. She has visited family in Seattle on various occasions, and has taken [minor] to visit two (2) times.

"[Mother] testified that she was aware of other nursing programs in California, and that there are community colleges in Mammoth Lakes and Bishop, Ca. She has not determined whether she could complete her needed 24 units at either of these schools. . . . [Mother] stated that she felt that it was very important for [minor] to have a relationship with [father]. She states that she was not moving to Seattle to punish [father] or to interfere with his relationship with [minor]. [Mother] proposed that, if she and [minor] moved to Seattle, [father] could have visitation with [minor] once a month for five (5) to seven (7) days with one (1) or two (2) overnights (not in a row) in Seattle. Further, she would bring [minor] to Mammoth one (1) weekend a month. Communication could also occur by Facetime. The parties agreed that the trip from Mammoth to Seattle, including driving and air travel, would be [at] least six (6) hours each way.

"[Mother] testified that during their relationship, subsequent to [minor's] birth, [mother] was the primary care giver for [minor]. [Father] made the money, traveled, and spent time with friends. [Mother] would dress, bathe, feed, and generally take care of [minor] on a daily basis. She took [minor] to most of her doctor's appointments, although [father] came to some but not all of the appointments. [Father] would play with [minor]; would help bathe her; change her diapers sometimes; watch her when [mother] went running or to the gym; and occasionally feed her. [Father] in his testimony acknowledged that he traveled to various ski resorts. He described these as business/pleasure trips due to his involvement in the ski industry in Mammoth. [Father] testified that other than when he was on these trips, he would be with [minor] every day

and help in her care when he was not at work. He would get up with them in the morning and would be involved in all aspects of [minor's] care.

"[Mother] stated that [father] and [minor] have a good relationship and [minor] loves him. When [father's] visitation occurs [minor] is happy and 'squeals with joy' when she sees [father]. [Minor] comes back clean, healthy, and well fed from the visitations.

"[Father] opposes [mother's] taking [of minor] to Seattle. He testified that he has been a large part of [minor's] life. He has been with [minor] every day except for the time when he traveled. He is very close to [minor]. Because of his business, he could not meet a visitation schedule as proposed by [mother]. He felt that such a move would substantially interfere with his relationship with [minor]." Testimony also established that father had substantial monetary means.

"Eric Wasserman testified that he is a financial advisor and a close friend of [father]. He has known [father] for ten (10) years and socializes with him frequently. He has known [mother] for four (4) to five (5) years and has socialized with [mother] and [father] together. He has observed both parties consume alcohol. He stated that he has seen [father] with [minor] ten (10) to fifteen (15) times. [Minor] and [father] interact very well with each other and [father] has a very strong bond with [minor]. He has never seen [father] under the influence of alcohol with [minor], and stated that [father] manages his consumption of alcohol. He testified that prior to [minor's] birth [father] was somewhat arrogant, but subsequently has 'really stepped up'."

"Diana Howe testified that she is employed by a local law firm and has known [father] for ten (10) years. She has known [mother] for six (6) to seven (7) years. During that time she and her husband have socialized with [mother] and [father] both together and separately. Since the parties[']' separation her daughter [D.] has play dates with [minor]. She stated that [father] relates well to [minor]. He is very sweet to [minor] and very attentive and protective. She and her husband have been out socially with [mother]

and [father] where she has observed both of them consume alcohol. She never observed [father] when he was not in control. She testified about the incident referred to by [mother] that occurred on August 27, 2015 when [father] took [mother] to the Emergency Room. [Father] had called [Howe's] husband, and [Howe] watched [minor] for a couple of hours while they went to the hospital. [Mother] and [father] came and picked up [minor]. [Father] did not appear to have been drinking. She stated that [father] was a very loyal friend and a good father and that she would have no reservations leaving her daughter with him. She also stated that [father] would be devastated if [minor] moved to Seattle. She testified that her husband is a recovering alcoholic [who] has not had a drink for over ten (10) months."

In the court's tentative statement of decision, it denied mother's request to move minor to Seattle. It awarded joint legal and physical custody to both parents in the event mother did not move, with visitation to be shared "equally on a basis of one week on -- one week off. If [mother] elects to move from California, [father] shall have sole physical custody of the minor child, subject to reasonable visitation to [mother]" to be determined later.

In making its ruling, the trial court acknowledged there was a stipulation "made without findings and was intended to be temporary until the trial of these issues. Therefore, the Court believes that the order contained herein can be made without consideration of whether either of the parties is the 'custodial' parent." The court recited the factors it was to consider under Family Code,[2] section 3011, subdivision (a) through (d) to determine what was in the best interest of minor. The court then made findings based on the assumption that "there are three possible alternatives: 1) That both parties remain in the same general area; 2) That the Court allows [mother] to move [minor] out

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[2] Further section references are to the Family Code unless indicated.

of state to Washington; 3) That the Court does not allow [minor] to be moved from California."

The trial court viewed the first alternative as being in the best interest of the child, but acknowledged relocation is common and unavoidable. "Resultantly, if the parties are not going to continue to live in the same area, it becomes incumbent on the Court to decide between the two (2) remaining alternatives, which would better meet the best interest of the child." The trial court then made numerous findings, which included, but were not limited to, a finding that minor had lived with both parents since her birth until separation and that mother stayed home with minor for that time. The court also found father provided the income for the family and had substantial assets. "While the evidence is conflicting as to the extent of [father's] involvement in the day to day care of the minor, clearly he was involved with the minor on a daily basis" and "minor child appears to have strong emotional bonds to both parents." However, "[t]he Court f[ound] it troubling that no independent evidence was submitted corroborating [father's] alleged alcohol abuse. [Mother] made various claims concerning [father's] alleged chronic alcohol abuse, and that there were individuals, including her mother, who witnessed this conduct. However, no such witnesses testified at trial. Also, no reports, written or otherwise, were submitted nor apparently exist. [Mother] never reported this alleged conduct to any appropriate agency. [Father] presented two (2) witnesses at the trial . . . who testified contrary to [mother's] contention that [he] abused alcohol."

The court further found mother had never lived in Seattle, had first considered going to nursing school and moving at the time of her separation from father, and had only researched her move and potential schooling options online. She was also "vague and uncertain as to how she would pay for her living and education expenses if she relocated;" her estimated expenses were $10,000 each month. The court's concluding finding was that "[m]oving the minor child during her formative years, as proposed by [mother], would substantially impair and interfere with [father's] custody/visitation

rights. He would be deprived of the 'frequent and continuing contact' that the Court finds is necessary in order to establish and proliferate a healthy relationship between a father and his young [child]. This in the Court's opinion would not be in the 'best interest of the child'."

Mother filed objections to the tentative statement of decision arguing the court committed both legal and factual error. Mother argued the court legally erred because it did not adequately consider the stability and continuity offered by the custodial parent and did not analyze "whether the non-moving parent should become the primary or custodial parent." Mother also argued she was prevented by her trial attorney from presenting evidence about father's alcohol consumption, her move to Seattle, and expert testimony regarding overnight visits with noncustodial parents. Mother's mother filed a declaration corroborating some of mother's allegations regarding father's alcohol consumption.

In its final statement of decision, the court rejected mother's objections to the state of the evidence finding she merely restated the evidence admitted at trial while also attempting to present additional evidence "in violation of numerous sections of the Evidence Code." The court did, however, find merit in mother's legal objection relating to her relocation and child support. On this point it stated: "[Mother] submits that this Court's order, regarding the custody of the minor, is in error in that it does not *presume* that [mother] is going to move to Seattle, Washington irrespective of this Court's order regarding custody. It was not clear to the Court at the trial that this was [mother's] intent. However in light of the clarification of [mother's] intent regarding her move to Washington, the Court is called upon to make a physical custody order consistent with those circumstances, including the Court's order that [mother] not take the minor out of the state of California. The Court finds that the appropriate order would be sole physical custody to [father] with reasonable visitation to [mother]." The court then ordered the parties to mediation to determine a visitation schedule, and ordered father to pay $2,500

per month in child support until a visitation schedule was known and the amount could be retroactively modified accordingly.

Mother filed objections to the statement of decision, arguing among other things that the court erroneously characterized the proceedings as a trial resulting in a final judgment. Two days later, she filed a "NOTICE OF WITHDRAWAL OF REQUEST FOR PENDENTE LITE ORDERS" regarding her request to relocate to Seattle. She also filed an ex parte application to retain the stipulated parenting plan her and father agreed upon in December 2015. At a hearing on these matters, the court found there was no pendente lite request for mother to withdraw. It also denied mother's ex parte application and her objections to the final statement of decision.

Judgment was entered that same day and provided: "[Mother's] request to move the minor child out of the State of California is denied. [¶] [Father] shall have sole physical custody of the minor child with reasonable visitation to [mother] which shall be as agreed upon by the parties. If the parties are unable to agree upon a visitation schedule, visitation shall be set by Court after mediation on that issue. The parties are ordered to mediation on the sole issue of [mother's] parenting/visitation time. The parties shall make themselves available to the mediator so that mediation can be completed within thirty (30) days from the date of this order. This mediation will not affect or delay this Court's order on the issue of sole custody to [father]."

Following entry of judgment mother and father stipulated to an "order for custody and visitation" wherein mother would have "visitation/parenting time" on an alternating two-day schedule to increase to an alternating three-day schedule.

Mother appeals the court's judgment awarding father sole physical custody.

DISCUSSION

I

Mother Forfeited Her Claim The Court Erred In Issuing Final Orders

Mother contends the trial court erred by entering final orders instead of the temporary orders she requested pending a trial on her move-away request. Mother has forfeited this contention for failing to timely raise it in the trial court.

"[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.) A party who fails to raise an issue in the trial court generally forfeits the right to challenge the ruling on that basis on appeal. (*Id*. at p. 1293, fn. 2.)

Here, mother never objected to the court's treatment of the hearing as a trial or its characterization of its order as a final custody order until she filed her objections to the final statement of decision, which the court properly denied as being untimely. (See Cal. Rules of Court, rule 3.1590(g) [a party has 15 days to object to a proposed or tentative statement of decision].) Mother had ample opportunity throughout the proceedings to make the objection she makes now, including in her objections to the court's tentative statement of decision, and raising this issue after the final statement of decision was filed and judgment prepared prevented the court from meaningfully addressing it. (See *In re S.B.*, *supra*, 32 Cal.4th at p. 1293.)

Mother appears to argue, however, this was her first opportunity to object because it was not until this time, when she also withdrew her move-away request, that the trial court "transmuted [her move-away request] into the trial of the underlying action and the [final] Statement of Decision directed preparation of a judgment." We disagree. Contrary to mother's claims on appeal, the hearing on mother's move-away request had always been characterized as a trial aimed at achieving final orders.

Mother first claims that because she made a request for order, which is tried through a combination of declarations and live testimony, she expected the resulting order to be temporary and not final as is customary after a family law trial. Mother puts too much reliance on the title of her request. A request for order "has the same meaning as the terms 'motion' or 'notice of motion' when they are used in the Code of Civil Procedure." (Cal. Rules of Court, rule 5.12(a).) Motions are applications for orders. (Code Civ. Proc., § 1003.) Orders, especially family law orders, can be either temporary or final. (§ 3022; see *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 258.) Whether an order is final or temporary is a question of whether " '[final] custody has been established by judicial decree.' " (*Montenegro*, at p. 256.)

Mother argues the record shows the parties did not intend for a final custody determination. Instead, they intended for an evidentiary hearing under section 217 and the findings from that hearing be temporary findings in anticipation of a trial to be held later. Not so. Father's request for order clearly indicates he saw mother's move-away request as a request for final and permanent orders requiring discovery. In fact, discovery did commence with several financial disclosures and mother's deposition. Mother and father entered into a stipulated temporary custody arrangement until trial. At the hearing where the stipulation was filed with the court, the court set the trial for February 23 and 24, 2016, discussed discovery, and scheduled a status conference. Both parties submitted "TRIAL BRIEF[s]," in which mother argued that the court apply the best interest of the child analysis in determining the initial permanent custody order involving a move-away request. From these facts, it is clear the parties intended the trial to result in final orders.

Mother also points to her attorney's request before trial for additional attorney fees to conduct further discovery into father's financial status. She argues such a request would be unnecessary if counsel believed the resulting orders would be final. We disagree. Citing *Thomas B. v. Superior Court* (1985) 175 Cal.App.3d 255, mother's trial counsel requested attorney fees for discovery purposes following trial because father was

not required to supply his financial records until after judgment of paternity had been entered. Trial counsel's reliance on *Thomas B.*, however, was misplaced. That case stands for the proposition that financial records are not discoverable for purposes of awarding interim support until after a prima facie showing of paternity is made. (*Id.* at p. 265.) Here, father admitted he was minor's parent, thus a prima facie showing was made and mother could have obtained father's financial records through the discovery process.

Regardless, the record does not indicate mother objected at trial to the discovery she was provided as inadequate, and she does not argue on appeal that the discovery was inadequate or that the child support award was erroneous. In fact, the trial court did not enter final orders regarding child support, and instead retained jurisdiction to modify the child support amount until after visitation was determined. Thus, nothing about mother's trial counsel's request for future attorney fees indicated mother believed the order on her move-away request would be a temporary order rather than a final order.

Mother also argues the court disregarded the Superior Court of Mono County Local Rules[3] for setting trial in support of her argument that she expected the trial to result in temporary orders. Again, we reject mother's contention. Mother cites rule 3.6 and multiple rules in chapter 4 to demonstrate the steps the trial court needed to take before holding a trial.[4] The problem with mother's argument is that chapter 4 applies to "all general civil cases," which "means all civil cases except . . . family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child

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[3] Further rule references are to the Superior Court of Mono County Local Rules unless otherwise indicated.

[4] Neither party has moved for judicial notice of the Superior Court of Mono County Local Rules. To adequately respond to mother's claims of error, we take judicial notice of these rules upon our own motion. (Evid. Code, § 452, subd. (e).)

Custody Jurisdiction Act, freedom from parental custody and control proceedings, and adoption proceedings) . . . ." (Rule 4.1) Further, rule 3.6 does not require formal notice of trial setting, as mother contends, but delegates the settings of trial and settlement conferences to the clerk's office. The rules contained in chapter 8, on the other hand, apply to family law proceedings and require the parties first go to mediation and that a prehearing conference be held to resolve all issues. (Rules 8.1(A)(3), 8.3) Here, the parties went to mediation and a status conference was scheduled before trial.[5] Thus, contrary to mother's contention, the court complied with the local rules.

Accordingly, mother knew the hearing on her move-away request would result in a final order and she was obligated to object before the final statement of decision was issued to preserve the issue for appeal. For similar reasons, we reject mother's argument she was denied due process to the extent she raises the issue.

II

Mother's Claim Is Not Moot

Father contends mother's appeal is moot because before entry of judgment mother withdrew her request to move away with minor and following entry of judgment "the parties stipulated to a parenting plan which was premised on Mother's abandonment of her intention to move to Seattle." Mother argues the issue is not moot because she was coerced into withdrawing her move-away request. We conclude mother's appeal is not moot.

"Appellate courts generally will neither decide controversies that are moot nor render decisions on abstract propositions. [Citations.] 'A case is moot when the decision

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[5] The record does not reflect whether a status conference was ever held, only that it was scheduled for January 14, 2016. Because we interpret the record to support the judgment and it is mother's burden to affirmatively demonstrate error, we interpret the setting of a status conference to mean the parties attended a status conference. (See *Scholes v. Lambirth Trucking Co.* (2017) 10 Cal.App.5th 590, 595.)

of the reviewing court "can have no practical impact or provide the parties effectual relief. [Citation.]" [Citation.] "When no effective relief can be granted, an appeal is moot and will be dismissed." ' " (*Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1485.)

However, "there are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480.)

Neither mother nor father spend much time arguing their respective positions regarding mootness. Father makes a blanket assertion that the appeal is moot because of a subsequent stipulation, while mother does not argue for any exception but merely posits that father's assertion is insulting. Regardless, because the factual findings underlying this final custody order have future consequences for mother in regard to future custody arrangements, we agree that mother's appeal from the order awarding sole physical custody to father is not moot. (See *In re Cassandra B.* (2004) 125 Cal.App.4th 199, 209.)

III

The Court Applied The Correct Standard And Did Not Abuse Its Discretion When Determining The Best Interest Of Minor

Mother brings two related claims concerning the court's order regarding her move-away request. She first argues the court applied the wrong legal standard when determining the best interest of minor. She further argues the court abused its discretion by failing to give the proper weight to the continuity and stability mother provided to minor when making its determination. We disagree with both contentions.

The normal standard of " 'appellate review of custody and visitation orders . . . is the deferential abuse of discretion test. [Citation.] The precise measure is whether the

trial court could have reasonably concluded that the order in question advanced the "best interest" of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked.' " (*Cassady v. Signorelli* (1996) 49 Cal.App.4th 55, 59.) However, "if a trial court's decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, it cannot be said the court has properly exercised its discretion under the law. [Citations.] Therefore, a discretionary order based on the application of improper criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even though there may be substantial evidence to support that order." (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15-16.)

Mother contends the trial court used the wrong standard when determining the best interest of minor and instead assigned all the detriment of a move to her, thereby punishing her "for seeking educational opportunities unavailable to her locally." The court's animus and confusion is clear, mother argues, by its statements on the topic of the move and about the proper legal standard. Thus, she concludes, instead of picking between which parent to award sole custody, the court should have weighed the factors to come up with a long-distance parenting plan. We disagree with mother's reading of the court's decision.

A custody determination must be made "according to the best interest of the child as provided in Sections 3011 and 3020." (§ 3040.) Section 3020, subdivision (a), "declares that it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children." It is also a public policy "to ensure that children have frequent and continuing contact with both parents." (§ 3020, subd. (b).) In determining the best interests of the child, the trial court must consider the following factors: the health, safety, and welfare of the child; any history of abuse by either parent; the nature and

amount of contact with both parents; and either parent's habitual or continual illegal use of controlled substances or alcohol. (§ 3011, subd. (a)-(d).)

"[I]n an initial custody decision, [involving a planned move away,] although the trial court must 'take into account' a planned move and any resulting prejudice to the child, those considerations do not preclude the court from also considering all the other circumstances bearing upon the child's best interest." (*Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 998.) "Among the factors that the court ordinarily should consider . . . are the following: the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101.)

Before a final custody order is issued, neither parent has the burden to show changed circumstances or that the move is necessary or would cause detriment, and there is no presumption that the existing custody arrangement is the appropriate one. (See *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 28, 34; *F.T. v. L.J.*, *supra*, 194 Cal.App.4th at pp. 18-20.) The court must decide the custody issue premised on the assumption that the parent will move away; the issue is not whether the parent should or may be permitted to move away, but " 'what arrangement for custody should be made' " when the parent moves. (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1126; *F.T. v. J.L.*, *supra*, 194 Cal.App.4th at p. 22.)

Here, the trial court listed the factors found in the Family Code as those it must consider when determining the best interest of the child. It did not list the additional factors articulated in *In re Marriage of LaMusga*; however, its factual findings make

clear it considered those concerns and weighed them when making its decision. As for the factor of minor's interest in stability and continuity in the custodial arrangement, the court found the parties entered the temporary stipulation expecting it would not prejudice them, thus there was no custodial parent based upon that stipulation. The court then looked to the custody arrangements before separation and found that while mother was a stay-at-home parent and father worked, father was still involved with minor's care on a daily basis, even though the extent of that involvement was contested. Further, minor was born in Mammoth Lakes and lived with both parents until the date of separation, when she moved to Bishop.

As to the factor regarding the distance of the move, the court acknowledged mother wanted to move to Seattle, Washington, where her father lived, which testimony established would take at least six hours of travel from Mammoth Lakes. The trial court acknowledged minor's birth date and found minor was in the formative years of development, fulfilling another factor announced in *LaMusga*. As for minor's relationship with her parents, the court noted mother had been a stay-at-home parent and that minor had strong emotional bonds to both parents.

As for the parents' relationship to one another, the court made multiple findings. The court impliedly found the parties had a relatively healthy relationship with one another that could only benefit themselves and minor if it continued. However, the court also found mother made "unsupported allegations" that father abused alcohol and presented no independent evidence corroborating these allegations despite her claims other people witnessed father's conduct. The court also found mother had first considered nursing school at the time the parties separated, approximately five months before the date of the hearing. Further, mother's planned move was vague, as she had not researched the schools she planned to attend or her housing options. She estimated she would require $10,000 a month in living and educational expenses and testified she would pay for her expenses through a combination of subsidies, student loans, child

support, support from her father, and part-time work "if necessary." Mother, however, did not confirm she was entitled to subsidies and nothing established that she had applied for student loans.

As noted, minor was rather young at the time and it does not appear appropriate to inquire into minor's wishes. The reason for the proposed move, as the court understood it, was for mother to achieve her nursing degree, which necessitated she first complete her general education requirements before transferring to a nursing program. Mother, however, did not explore any local or online educational opportunities. Finally, the court did not make any finding as to the current custody arrangement because the parties entered into it on a temporary and nonprejudicial basis.

From its recitation of the law and its factual findings, it is clear the court knew its duty was to weigh multiple factors and circumstances to determine what was in minor's best interest. Although the court listed the three potential alternatives -- the parties stay in the same area, mother moves minor to Seattle, or mother does not move minor to Seattle -- and then ordered custody for multiple scenarios, this was the court's tentative statement of decision, which it fixed in the statement of decision. The statement of decision makes clear the court assumed mother would move and issued orders consistent with the analysis in its tentative statement of decision.[6] Regardless, the court did not characterize its decision as one of whether mother should move to Seattle, but whether it was in minor's best interest to go with mother to Seattle in the event she moved, treating mother's request as a serious one. This was the court's duty in an initial child custody

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[6] Mother points to comments the court made at the hearing on her objections to the final statement of decision as evidencing the court's confusion about the scope of its discretion. The comments cited by mother are taken out of context and are not comments on the court's understanding of its own discretion but comments about mother's inconsistent objections to the tentative statement of decision and final statement of decision.

determination, making this case remarkedly different than *F.T.* where the court failed to make express findings as required by section 3044, subdivision (a) regarding the mother's alleged acts of domestic violence before reaching a decision on father's move-away request.[7] (*F.T. v. L.J., supra*, 194 Cal.App.4th at p. 28.)

Citing the court's finding that father's relationship would be hindered by mother and minor's move, mother argues the court's analysis presumed that because mother was the moving parent she was to bear the burden of any consequence of moving. Mother argues the court sought to punish her for choosing to better her education and points to the court's disapproval of the reason for her move as contained in the statements of decision as evidence of the court's intent.

Again, we do not agree with mother's reading of the record. First, the court did not show disapproval of the reason mother sought to move to Washington. The court acknowledged it was for educational purposes and expressed no opinion regarding that reason. The court showed disapproval for the way in which mother decided to effectuate her move. Mother did not have a plan for housing, child care, or how she would pay her and minor's living expenses let alone how she would pay for her educational expenses. Although mother sought to complete her education in Seattle, she did not explore any options for completing the same education locally and only decided to pursue her

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[7] Mother appears to argue the court also failed to make express findings regarding mother's allegations of alcohol abuse (§ 3011, subd. (e)(1)) and its decision to award sole custody to father (§§ 3082, 3087). Not so. The court found mother's allegations of alcohol abuse were unsubstantiated. Further, mother did not request a statement of reasons regarding the court's award of sole physical custody to father as required by section 3082 until she objected to the statement of decision, which as discussed was untimely. Finally, section 3087 concerns modifications of existing joint custody orders, which is not applicable to mother's case as the court was not modifying an order but making an initial child custody determination. Regardless, the court's tentative and final statements of decision show the facts it relied upon when deciding to award father sole physical custody.

education in Seattle five months before the hearing. These facts are relevant to minor's health, safety, and welfare if relocated to Seattle, and relevant to mother's relationship with father and her ability to successfully coparent.

Further, the court's finding that father's relationship with minor would be adversely affected by minor's move to Seattle did not equate to a finding that mother's relationship with minor was to bear the consequences of mother's move. The court acknowledged that both parents had strong emotional bonds with minor and thought the minor's best interest would be best served if both parents lived in the same area. But, while recognizing that living in the same area was "not always possible, practicable, or desirable," the court had to make a determination in light of mother's planned move. The court then listed multiple reasons a move to Seattle was not in minor's best interest, including the impact it would have on father's relationship, mother's financial instability, and her unsubstantiated allegations regarding father's alcohol abuse. Thus, the court did not punish mother for her decision to move, but weighed the effect of the move on father's relationship with other facts as required.

Mother also contends the court improperly understood its discretion as a choice between which parent should have sole physical custody. Instead, it should have fashioned a long-distance parenting plan providing time in the home of both parents. Not so. The court awarded sole physical custody to the parent living in the same city as minor and directed the parties to mediation to determine a reasonable and suitable visitation schedule for the noncustodial parent. The court did not end its analysis with the sole physical custody award, as mother contends, but instead reserved jurisdiction for visitation in the event the parties could not agree.

In addition to applying the correct standard, the trial court did not abuse its discretion. Mother argues an abuse of discretion occurred based on the court's failure to properly weigh minor's interest in continuity and stability of care. Relying on *In re Marriage of Burgess*, *supra*, 13 Cal.4th at p. 39, mother argues that, as minor's primary

caretaker, the stability she provided should have " 'prevail[ed].' " Mother's reliance is misplaced.

In *In re Marriage of Burgess*, the custodial parent sought to modify a temporary custody order into a permanent custody order allowing her to move with the minors to a neighboring city. (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 37.) While the court observed, as mother points out, that "the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail," it also observed "that bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts." (*Id.* at p. 39.) Further, the moving parent in *In re Marriage of Burgess* was the custodial parent who provided near exclusive care of the children for the year before the move (*id.* at pp. 32, 37); while here, there was no custodial parent, thereby mother could not benefit from the presumption at issue in *In re Marriage of Burgess* and codified in section 7501 entitling a custodial parent to change the residence of the minor absent a showing the change "would prejudice the rights or welfare of the child." (§ 7501.)

Regardless, the court took into consideration the care and stability mother provided. As emphasized in *In re Marriage of Burgess*, "the paramount need for continuity and stability in custody arrangements -- and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker -- weigh heavily in favor of maintaining ongoing custody arrangements." (*In re Marriage of Burgess, supra*, 13 Cal.4th at pp. 32-33.) Here, the parties entered a nonprejudicial temporary order before trial, thus the court analyzed the minor's best interest with the custody arrangement mother and father had around the time of separation in mind. It found that mother had been a stay-at-home parent, and that while father worked, he was also involved in minor's care on a daily basis. The court further acknowledged the evidence regarding the extent of father's involvement was conflicting.

The court's findings implied that the continuity of mother's relationship following a move to Seattle would not remain the same as before the move. Mother's schedule would drastically change and she would not be as involved in minor's hourly care because she would be going to school full time (potentially 45 minutes away). Further, mother could also be working part time to pay for her estimated $10,000 a month living and educational expenses. Given that both mother and father were involved in minor's daily care before separation, it was not an abuse of discretion for the court to conclude that remaining in Mammoth Lakes, in the home minor had always lived in and with the parent whose schedule would remain the same, was in minor's best interest.

Mother points to the court's comments at the hearing on her objections to the final statement of decision as evidencing its improper assumption the law requires a "50-50 residential schedule" between mother and father, which explains why the court prevented mother from moving. At the hearing mother argued she was entitled to more parenting time than father while the two lived in the same area because she was minor's primary caregiver. The court responded, "Why would she be entitled to more time than the father? Isn't it equal now? Don't parents have equal rights? There's no preference one way or the other? I mean, shouldn't the parents have equal time? That's what the law says, that they should have equal time together, equal parenting time. Why should because the mother suckled the child or whatever, that's contained in some of these declarations, give her the right to have the child in her custody on a more frequent basis than the father?"

The court's statement was not made in the context of mother's move-away request but in the context of her request for more than equal custody time for the time she remained in the Mammoth Lakes area before a move. We do not see how the court's alleged assumption that a 50/50 residential parenting schedule was preferred when the parents reside in the same area explains why the court denied mother's move-away request.

Further, while, "[t]he Family Code specifically refrains from establishing a preference or presumption in favor of any arrangement for custody and visitation" (*In re Marriage of Burgess, supra,* 13 Cal. 4th at p. 34, see § 3020), section 3010 dictates both the mother and the father of a minor "are equally entitled to the custody of the child." The court acknowledged there was no preference between a mother or father as to who should be awarded custody, and in the absence of a finding mother was the custodial parent, the court justifiably although unartfully, asked mother why she was entitled to more than an equal share of visitation time simply because she was the mother of minor. The court's comments do not show an abuse of discretion.[8]

DISPOSITION

The judgment is affirmed. Father is awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Blease, J.

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[8] Mother raises two issues for the first time in her opening brief's conclusion. She argues the court erred by failing to comply with section 3048's requirements of detailed jurisdictional and abduction risk findings as mother requested considering father's ties to Europe and by restricting both parents from removing minor from California without any findings justifying the permanent restriction. We decline to address these contentions because they have not been properly presented for appellate review. (Cal. Rules of Court, rule 8.204(a)(1)(B) [appellant's brief "must" "[s]tate each point under a separate heading or subheading summarizing the point"]; *Wint v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 265 [it is the appellant's burden to show error by argument and citation of authority].)